dealing with the respondent's case and contributory negligence. Based on his findings the learned judge should have held that (a) that the respondent was riding his motor-cycle without keeping any proper lookout, (b) that he attempted to overtake the said motor-car on the right when it was unsafe to do so and (c) that the cause of the accident was due entirely to his own negligence. Not only would we set aside the apportionment of one-third blame attributed to the appellant and two-thirds to the respondent, we would also quash the whole of the Court Order and enter judgment in favour of the appellant and direct that the claim of the respondent against the appellant be dismissed. For the above reasons, the appeal is allowed with costs to the appellants here and below to be taxed. The deposit of $500/– to be refunded to the appellant forthwith.

Appeal allowed.

Solicitors: *Wong Chooi & Mohd. Nor.; R.K. Nathan & Co.*

VEETAK ENTERPRISE SDN. BHD. v. THE KUALA LUMPUR FINANCE BHD.

[O.C.J. (Gunn Chit Tuan J.) January 18 & 21; February 15, 1985]

[Kuala Lumpur – Civil Suit No. C2375 of 1984]

Practice and Procedure – Application to strike out plaintiff's action – Whether frivolous or vexatious and an abuse of the process of the court – Pleadings to be struck out only in plain and obvious cases – Not permissible to try action on affidavits when facts and issues are in dispute – R.H.C. 1980, O.18 r.19.

In this application under Order 18, rule 19(1)(a), (b) and (d) of the Rules of the High Court 1980, the defendant asked for an order that the action by the plaintiff for damages by reason of acts of conversion alleged to be committed by the defendant in respect of the issue of certain documents of title to the land be dismissed on the ground that the action discloses no reasonable cause of action, was frivolous or vexatious and an abuse of the process of court.

The defendant/applicant contended that the plaintiff had no lawful cause of action against the defendant, that the plaintiff was now estopped by record on the principle of *res judicata* from raising an issue in the present action which it could but did not raise in the former action, and that in the present action the plaintiff could not be permitted to set up its own fraudulent or illegal act in support of its claim. The plaintiff contended that the powers under Order 18 rule 19 of the Rules of the High Court 1980, ought not to be exercised if the plaintiff may have a cause of action with some chance of success when only the allegations in the pleadings were considered. The plaintiff argued that the defendant could not raise the issue of estoppel and that on the issue of *res judicata* it was argued that the pleadings would only be struck out in plain and obvious cases.

Held: (1) the law concerning the exercise of powers under Order 18 rule 19 is clear and settled. It is only in plain and obvious cases that recourse can be had to the summary process under that rule, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33, rule 2;

(2) on an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute;

(3) in all the circumstances of this case, the plaintiff's claim was not frivolous, vexatious and an abuse of the court's process. Accordingly the plaintiff's action ought not to be dismissed summarily under Order 18, rule 19 of the Rules of the High Court 1980.

Cases referred to:

(1) *Khan* v. *Goleccha International Ltd.* [1980] 2 All E.R. 259, 264.
(2) *Othman & Anor.* v. *Mek* [1971] 2 M.L.J. 214, 216.
(3) *Henderson* v. *Henderson* [1843-1860] All E.R. Rep. 378.
(4) *Hoystead & Ors.* v. *Taxation Commissioner* [1925] All E.R. 56, 64.
(5) *Kesarmal & Anor.* v. *Valliappa Chettiar & Anor.* [1954] M.L.J. 179.
(6) *Kan Tak Fee & 2 Ors.* v. *Au Phin Yean* [1934] M.L.J. 94, 95.
(7) *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1.
(8) *Dressy Frocks Pty. Ltd.* v. *Bock* [1951] N.S.W.R. 390.
(9) *Selangor United Rubber Estates Ltd.* v. *Cradock (a bankrupt) & Ors. (No. 3)* [1968] 2 All E.R. 1073, 1150.
(10) *Puran Singh* v. *Kehar Singh & Anor.* [1939] M.L.J. 71, 75.
(11) *Barrow's case* (1880) 14 Ch. D. 432.
(12) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49.
(13) *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.* [1984] 2 M.L.J. 105, 113.
(14) *Brisbane City Council* v. *Attorney-General* [1979] A.C. 411, 425.
(15) *Evans* v. *Bartlam* [1937] A.C. 473.
(16) *Hubbuck* v. *Wilkinson* [1899] 1 Q.B. 86, 91.
(17) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871 C.A.
(18) *Heald & Anor.* v. *O'Connor* [1971] 2 All E.R. 1105.
(19) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1962] M.L.J. 35.

CIVIL SUIT.

Sri Kumar for the plaintiff.
B. K. Tan for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J. : This was an application under Order 18 rule 19(1) (a), (b) and (d) of the Rules of the High Court, 1980, by the Kuala Lumpur Finance Berhad (the defendant) praying for an order that an action by Veetak Enterprise Sdn. Bhd. (the plaintiff) in Kuala Lumpur High Court Civil Suit No. C2375 of 1984 for damages suffered by reason of act or acts of conversion committed by the defendant in respect of the issue documents of title to the lands held under H.S. (D) Nos. 179 to 1806, 1826 to 1919, 1921 to 1923, 1925 to 1932 for Lots Nos. 379 to 389, 391 to 402, 409 to 502, 504 to 506 and 508 to 515, all in Bandar Banting in the District of Kuala Langat (the said lands) be dismissed on the grounds that the action discloses no reasonable cause of action, is frivolous or vexatious and an abuse of the process of court.

There were basically, according to Mr. B.K. Tan, counsel for the defendant, the following grounds in support of the defendant's application herein. First, it was contended that the plaintiff had no lawful cause of action against the defendant because the subject matter of the claim herein, according to counsel for the defendant, is concerned with a first charge on the said lands which were sold by public auction pursuant to an order of the High Court in Kuala Lumpur High Court Originating Summons No. F 570/83 (Family & Property Division) (hereinafter referred to as "the former action"). The brief facts of and the events in the former action were as follows. The defendant granted two loan facilities of $2 million and $1 million respectively (the said loans) to a company called Serba Kredit Sdn. Bhd. (the borrower) on the security of a first and second third party charge created by the plaintiff in favour of the defendant. On the failure of the borrower and the plaintiff to repay the said loans as demanded by the defendant pursuant to the provisions of the National Land Code the defendant instituted foreclosure proceedings against the plaintiff in the former action on June 4, 1983. On June 15, 1983, the plaintiff entered an appearance to the former action but did not take any further steps in the proceedings and the defendant obtained a default judgment on August 17, 1983, before Justice L.C. Vohrah who granted an order for sale of the said lands and also ordered, *inter-alia*, that the said lands be sold by public auction to recover the outstanding loans due to the defendant. On January 5, 1984, a consent order was also obtained by the defendant from the Senior Assistant Registrar in the presence of one Foo Kiam Min, a director of the plaintiff for a public auction of the said lands in April 1984, at a reserve price of $3,898,000.00. A proclamation of sale of the said lands was published twice in the *New Straits Times* but the first auction sale was abortive and the reserve price was reduced to $2,500,000.00. On May 25, 1984, the said lands were sold by public auction for a sum of $3,515,000.00 and the proceeds thereof have since been paid out by the High Court to the defendant. It was therefore the contention of Mr. B.K. Tan that the subject matter in the present and the former action are the same *i.e.* the first charge on the said lands, and the plaintiff had not at any time made any application to set aside the order of sale made by Justice Vohrah or the consent order for directions made by the Senior Assistant Registrar, nor has there been any appeal from the judgment or order. In support of his contention that the plaintiff has no cause of action because of the High Court order in the former action Mr. Tan referred to and relied on the following passage in page 778 of *Winfield* on Tort (8th. Edition):

"Final judgment by a court of competent jurisdiction extinguishes a right of action. It has a twofold effect. First, it estops any party to the litigation from disputing afterwards the correctness of the decision either in law or in fact. Secondly, it operates as a merger of the original cause of action in the rights created by the judgment.

The reason why judgment wipes out the plaintiff's original cause of action is put on either of two grounds. One is public policy: 'interest republicae ut sit finis litium'; the other is private justice: 'nemo debet bis vexari pro uno et eadem delicto'."

Next, it was the contention of Mr. Tan that the plaintiff was now estopped by record on the principle of '*res judicata*' from raising an issue in the present action which it could but did not raise in the former action. He then referred to the following passage on issue estoppel in the judgment of Brightman L.J. in *Khan* v. *Goleccha International Ltd.*[1]:

"First, for the general principle (*Ord* v. *Ord* [1923] 2 K.B. 432 at 439, [1923] All E.R. 206 at 210 per Lush J; I need not narrate the facts):

'The words "res judicata' explain themselves. If the res – the thing actually or directly in dispute – has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea

of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward ...'

I turn straight to the wider principle ([1923] 2 K.B. 432 at 443, [1923] All E.R. Rep. 206 at 212):

'The maxim "Nemo debet bis vexari" prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising the contention. It is not that it has been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been.'

Counsel then referred to *Othman & Anor.* v. *Mek*[2] in which Wan Suleiman J. (as he then was) following the decision in the leading case of *Henderson* v. *Henderson*[3] held that the plea of *res judicata* applied, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time. In that case the plaintiffs were trying to re-open the same subject of litigation in respect of matters which could have been brought forward in a 1958 suit and His Lordship therefore held that the plea of *res judicata* applied. Reference was also made by Mr. Tan to *Hoystead & Ors.* v. *Taxation Commissioner*[4] in which the Privy Council held that the principle of estoppel by record also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. After reference to the above cases Mr. Tan contended that the issues now raised by the plaintiff could have been raised by it before Vohrah J. in the former action and His Lordship would not then have made the order of foreclosure. On the question of fraud, counsel referred to *Kesarmal & Anor.* v. *Valliappa Chettiar & Anor.*[5] and contended that that could also have been raised by the plaintiff in the former action.

The third contention of counsel for the defendant was that the plaintiff in the present action could not be permitted to set up its own fraudulent or illegal act in support of its claim. He relied on *Kan Tak Fee & 2 Ors.* v. *Au Phin Yean.*[6] In that case Gerahty J. held that the defendant could not set up his own fraud in order to avoid the declaration of trust he had made in favour of the plaintiff. The final point made by counsel for the defendant was that the plaintiff's claim in the present action is frivolous, vexatious and an abuse of the court's process as it was intended by it to delay the defendant's (further and proposed?) action against the borrower and the plaintiff as guarantors of the said loans which have been admitted by the plaintiff. For support of this contention, counsel relied on the Privy Council's case of *Tractors Malaysia Bhd.* v. *Tio Chee Hing.*[7] In that case the appellants had obtained a consent judgment against the respondent. The respondent applied in the same action to have the judgment set aside but the application was dismissed. Subsequently the respondent brought an action to set aside the consent judgment in the former action. The learned trial judge set aside the proceedings on the ground that the action was frivolous and vexatious and brought to defeat the course of justice in the hope of delaying the execution of the judgment. The learned trial judge's decision, which was reversed by the former Federal Court, was confirmed by the Privy Council.

On the other hand, Mr. Sri Kumar, counsel for the plaintiff, after a brief reference to the commentary on the exercise of powers under Order 18 rule 19 in the *Supreme Court Practice, 1985,* at pages 305 and 306, submitted that the powers under Order 18 rule 19 of our Rules of the High Court, 1980, ought not to be exercised if the plaintiff may have a cause of action with some chance of success when only the allegations in the pleadings are considered. He too referred to several cases, and the first relevant authority was the Australian case of *Dressy Frocks Pty. Limited.* v. *Bock*[8] in which the Supreme Court of New South Wales decided in 1951 that a loan of money by a company within the meaning of the Companies Act, 1936, to a person to enable that person to purchase shares of the company is illegal and void by virtue of section 148 (1) of the Act which is somewhat similar to section 67 of our Companies Act, 1965. That Australian case was referred to by Ungoed-Thomas J. in his long judgment in *Selangor United Rubber Estates Limited* v. *Cradock (a bankrupt) and Ors. (No. 3).*[9] For present purposes it is only necessary to refer to those facts in that case and to that part of His Lordship's judgment which are relevant to counsel's contention. In that English case the plaintiff's company had liquidated assets including a credit for some £232,500/- with a bank. C Limited, a banking company concerned in take-over bids, acting on behalf of an undisclosed principal who was C, bid

for the share capital of the plaintiff company, and the offer was accepted by holders of 79% of the plaintiff company's share capital. C had an account with a branch of the D Bank which was in negligible credit. To enable C's account to meet the cost of acquisition of about £195,000/-, C's account was credited by a cheque for £232,500/- drawn by the plaintiff company in favour of W Limited (a private investment company) and endorsed on behalf of W Limited to C. The £232,500/- so paid by the plaintiff company represented a loan to W Limited at interest, and the further transfer to C represented a loan by W Limited to C at slightly greater interest. Thus the credit balance of the plaintiff company was ultimately applied as to some £195,000/- in paying for the acquisition of some 79% of the plaintiff company's shares by C. The plaintiff company later claimed, *inter alia*, against W Limited as constructive trustee in respect of the £232,500/-, but W Limited did not dispute the equitable obligation, raising only defences on the basis of novation, satisfaction and illegality. Ungoed-Thomas J. held, *inter alia*, that in regard to the claim against W Limited that the loan of £232,500/- by the plaintiff company to W Limited was unlawful and was avoided by section 54 of the English Companies Act, 1948, which like section 67 of our Companies Act, 1965, provides that "it shall not be lawful for a company to give ... any financial assistance for the purpose of ... a purchase ... made or to be made by any person of or for any shares in the company ..." However, His Lordship held for reasons given in his judgment that although the loan by the plaintiff company to W Limited was unlawful and was avoided by section 54 of the English Companies Act, 1948, yet for other reasons given in his judgment it did not defeat the plaintiff company's claim in that case. It was the contention of Mr. Sri Kumar that there was an issue of fact for a trial court to decide whether a Mr. Ong Tat Poh, who was a solicitor for the defendant, was a party to a scheme by the defendant to lend money to the borrower for purchase of the plaintiff's shares and whether the loan on the first charge in this case was unlawful and void by section 67 of our Companies Act, 1965.

It was another submission of counsel for the plaintiff that the defendant could not raise the issue of estoppel and he referred to the former Court of Appeal case of *Puran Singh* v. *Kehar Singh & Anor.*[10] In that case reference was made by Thomas C.J. to *Barrow's case*[11] in which was stated by Bacon, V.C. in the course of his judgment that:

> "the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament."

It was held by the former Court of Appeal, *inter alia*, that there can be no estoppel against a statutory provision in an Enactment which legislates on a matter of general interest.

Counsel for the plaintiff then referred to and submitted that the following passages in the judgment of Viscount Radcliffe in the Privy Council's case of *Kok Hoong* v. *Leong Cheong Kweng Mines Limited*[12] were relevant:

> "Their Lordships turn to the first ground. In their view there is no doubt that by the law of England, which is the law applicable for this purpose, a default judgment is capable of giving rise to an estoppel per rem judicatam. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *Re South American* v. *Mexican Co.*) and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.
>
> Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigour of any principle as widely formulated as that of *Henderson* v. *Henderson, supra*. It may well be doubted whether the learned Vice-Chancellor had in mind at all the peculiar circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of "special cases." In any event it is clear from what has been said in other authorities more immediately directed to the point that a much more restricted operation must be given to any estoppel arising from a default judgment."

And on the issue of *res judicata*, counsel referred to the recent case of *Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.*[13] in which the Federal Court in a judgment delivered by Wan Suleiman F.J. held that under Order 18 rule 19 of the Rules of the High Court pleadings will only be struck out in plain and obvious cases. So long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff is unlikely to succeed in the trial is no ground for striking out. In the circumstances of that case their Lordships held that the doctrine of *res*

judicata should not be applied in that case as the cause of action and the issues were different, and cited with approval a passage on the defence of *res judicata* in the House of Lords' case of *Brisbane City Council* v. *Attorney-General.*[14] Counsel for the plaintiff pointed out that in the former action no affidavit was filed by the plaintiff alleging that there was illegality before the default judgment was entered against it. He finally referred to the case of *Evans* v. *Bartlam*[15] in which the House of Lords held, *inter alia,* that a judgment debtor who asked for and obtained a stay of execution does not thereby approbate the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise. Counsel pointed out that when the plaintiff through its director Foo Kiam Min consented to the order for directions made by the Senior Assistant Registrar on January 5, 1984, that director of the plaintiff had no knowledge of the plaintiff's rights to apply to set aside the judgment obtained by default before Vohrah J. He then referred to the *dictum* of Lord Atkin in that case that "unless and until a Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

The law concerning the exercise of powers under Order 18 rule 19 is clear and settled. It is only in plain and obvious cases that recourse can be had to the summary process under that rule, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33, rule 2 (*Loh Holdings Sdn. Bhd.* v. *Peglin Development Sdn. Bhd. & Anor.,*[13] per Lindley M.R. in *Hubbuck* v. *Wilkinson*).[16] It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action, and, on an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock* v. *Moloney*).[17]

Bearing in mind the principles enunciated in the above cases, I first decided to consider the contention of Mr. Sri Kumar that the case ought to be left to a trial court to decide the issue of fact as to whether the said Ong Tat Poh was a party to the said scheme and also to decide the issue of law as to whether the first charge in this case was unlawful and void by section 67 of our Companies Act, 1965. Reference should therefore be made here to the plaintiff's statement of claim in the present action and in particular to paragraph 5 thereof which is as follows:

"5. The said charge was in truth and fact a security provided by the plaintiff to give indirect financial assistance to the borrower for the purpose of purchasing the shares in the plaintiff. The defendant was privy to this transaction.

PARTICULARS

(a) In or about the month of December 1979, the borrower concluded an oral agreement with the shareholders of the plaintiff to purchase the shares in the plaintiff;

(b) In or about the month of January 1980 the borrower made an informal application to the defendant for a loan of $2 million. At a meeting held in or about the month of January 1980 attended by a representative of the defendant and one Daniel Tan Kah Choun representing the borrower it was disclosed to the defendant's representative that the purpose of the loan was to purchase the shares in the plaintiff. The defendant by its said representative requested for security for the loan and accepted the offer of the plaintiff's lands as such security;

(c) A meeting was held in or about the month of May 1980 and attended by the said Daniel Tan Kah Choun on behalf of the borrower, and one Ong Tat Poh, an advocate and solicitor representing the defendant. At the said meeting the said Ong Tat Poh on behalf of the defendant devised a scheme whereby:

(i) the defendant would lend a sum of $2 million to the borrower on the security of the said lands to be provided by the plaintiff;

(ii) the borrower would then lend the said $2 million to its directors for them to purchase the shares in the plaintiff and hold in trust for the borrower.

The said scheme was devised by the said Ong Tat Poh for the purpose of evading the provisions of section 67 of the Companies Act, 1965.

(d) Acting pursuant to the said scheme:

(i) the said lands were charged by the plaintiff to the defendant;

(ii) the defendant, in or about the month of July 1980 released to the borrower the loan of $2 million; and

(iii) upon receipt of the said loan, the borrower lent to its directors the sum of $2 million which was utilised by them to purchase the shares in the plaintiff which shares were thereafter held in trust for the borrower.

(e) The defendant had full knowledge of all material facts touching and concerning the matters set forth hereinbefore."

Although the plaintiff in the present action is claiming, *inter alia,* against the defendant for

damages for conversion, it was not disputed that it is in the present action also claiming that the first charge was null and void by reason of section 67 of the Companies Act, 1965, which prohibits dealing by a company in its own shares, *etc.*, and sub-section (1) of which is as follows:

"67. (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares."

It would therefore be a contention of the plaintiff in the present action that the auction sale in respect of the first charge in the former action was unlawful and that it would be entitled to damages against the defendant for conversion of the title deeds of the said lands. Mr. Tan, however, pointed out that no affidavit by the borrower had been filed in this application to support the plaintiff's allegations and contended that contrary to the above averment in paragraph 5(a) of the plaintiff's statement of claim, the plaintiff and the borrower had already planned the scheme referred to in paragraph 5(c) of the statement of claim which, the plaintiff now alleges, was devised by the said Ong Tat Poh. Counsel also referred to an affidavit by the said Ong Tat Poh (enclosure 15) affirming that the plaintiff's allegation is "false, wild and preposterous." He also contended that there has been a fraud committed on the defendants in that when the plaintiff and the borrower applied for a loan they had stated in their application that the loan was only for housing development but instead the loan was used to finance the purchase of shares in the plaintiff by the borrower in contravention of section 67 of the Companies Act, 1965.

Having perused the affidavits filed in this application I was inclined to consider that the said Ong Tat Poh was probably not involved in the said scheme although Mr. Sri Kumar had contended that that issue of fact should be left to a trial court. But, however, assuming for the purposes of arguments that the plaintiff would not be able to satisfy a court that the said Ong Tat Poh was a party to the said scheme, then there was substance in the contention of counsel for the defendant that the plaintiff in the present action could not be permitted to set up its own illegal act in support of its claim, although it would also be arguable, as contended by counsel for the plaintiff, whether estoppel can be applied to section 67 of the Companies Act, 1965. There is also the other issue of law raised by Mr. Sri Kumar as to whether the loan on the first charge was invalidated by that section of the said Act. Counsel for the plaintiff has already referred to *Selangor United Rubber Estates Limited* v. *Craddock (a bankrupt) & Ors. (No. 3)*[9] and it is interesting to note here the following *dictum* of Ungoed-Thomas J. in that case:

"The ambit, within which such consequences of the illegality operate, has by no means been clearly defined. This amply appeared from the arguments before me. The usual field of its operation is certainly contract; but then contract is the field which gives most scope for its operation."

As far as I am aware the issue of the validity of any security given in contravention of section 67 of the Companies Act, 1965, has not yet been considered by our courts. The views of Ungoed-Thomas J. on this was followed in the recent Queens Bench Division case of *Heald & Anor.* v. *O'Connor*[18] in which Fisher J. held that a security was invalid if given in contravention of section 54 of the U.K. Companies Act 1948, which is similar to section 67 of our Companies Act, 1965. I was aware that this was not a case in which the defendant had given a loan to the borrower or the plaintiff for the purchase of its own shares. But then it was obvious that on this issue raised by Mr. Sri Kumar, who made only cursory references to the said authorities without any attempt by Mr. B.K. Tan to distinguish them, that the present case was not so plain and obvious that the pleadings of the plaintiff should be struck off.

With regard to the defendant's first and second grounds in support of its application and the above passage in *Winfield on Tort* relied on by Mr. Tan, I noticed that that passage is in a chapter of the said text book in which the learned author was principally concerned with the various ways in which the extinction of liability in tort may take place, as for instance, when there is a final judgment by a court of competent jurisdiction which extinguishes a right of action. The learned author was however not there concerned specifically with the doctrine of '*res judicata*' and therefore did not in his text book on tort discuss in detail the meaning of finality in a judicial decision. For the purposes of this application I too did not consider it necessary for me to examine that doctrine in detail except to refer once again to *Othman* v. *Mek*[2] in which case Wan Suleiman J. (as he then was) has pointed out when the plea of *res judicata* applied. Although Mr. Tan did at a later stage of his oral submission urge me to treat the judgment obtained

before Vohrah J. and the consent order of the Senior Assistant Registrar as one consent judgment or order, I rejected that submission because the judgment and order in the former action were made on two different and separate occasions by a judge and a judicial officer respectively. With respect I think Mr. Tan probably overlooked the fact that the judgment obtained before Vohrah J. in the former action was a judgment by default and not a consent judgment when he first addressed the court. When he finally replied to the submission of Mr. Sri Kumar and referred to the judgment of Ong J. in *Kok Hoong* v. *Leong Cheong Kweng Mines Limited*[19] he, with respect, overlooked the fact that that judgment of His Lordship was overruled by the former Court of Appeal ([1962] M.L.J. 224), and on further appeal to the Privy Council, their Lordships dismissed the appeal and held that the decision of the former Court of Appeal was correct. The short answer therefore to the first and second contention of Mr. Tan on behalf of the defendant is to be found in that Privy Council's judgment in *Kok Hoong* v. *Leong Cheong Kweng Mines Limited*[12] that default judgments though capable of giving rise to estoppels must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must necessarily and with complete precision have been thereby determined. In the former action, the plaintiff merely entered an appearance and did not take any further steps in the proceedings before the default judgment was obtained before Vohrah J. It cannot therefore be said that by that default judgment the Court has in the former action adjudicated upon any of the issues now raised by the plaintiff who is thereby estopped from raising them in the present action. This is, I think, one of the "special cases" which the learned Vice-Chancellor in *Henderson* v. *Henderson*[3] and Wan Suleiman J. (as he then was) in *Othman* v. *Mek*[2] had in mind. As I did not in all the circumstances of this case consider that the plaintiff's claim was frivolous, vexatious and an abuse of the court's process, I therefore declined at this stage to exercise the summary but nevertheless drastic powers of the court under Order 18 rule 19 Rules of the High Court, 1980, to order that the plaintiff's action be now dismissed.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Sothi & Ang.*

SENG HUAT HANG SDN. BHD. & ORS. v. CHEE SENG & CO. SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) December 3 & 4, 1985]

[Penang – Suit No. 1398 of 1985]

Practice and Procedure – Application to strike out Writ of Summons and Indorsement of Claim – Allegation of fraud in previous proceedings – Estoppel.

In this case the defendant applied to strike out a writ of Summons and Indorsement of Claim as, *inter alia*, being frivolous, vexatious and an abuse of the process of the Court. The main argument of the defendant is that the plaintiffs' claim is barred by estoppel which arises from eight possession orders made in Civil Actions Nos. 1051, 972 to 978 all of 1978 in which the present defendant was the plaintiff and the present plaintiffs were the defendants. The plaintiffs, however, claimed, *inter alia*, for a declaration that the possession orders are null and void and as having been procured by a fraudulent misrepresentation of a material fact namely non-disclosure of the fact that the defendant had no title to sue for possession.

Held, granting the application: (1) the jurisdiction to strike out a Writ of Summons and Indorsement of Claim as being, *inter alia*, vexatious, frivolous and an abuse of the process of Court, ought to be very sparingly exercised and only in cases when it is obvious that the claim is devoid of all merit or cannot possibly succeed;

(2) there is no fraud on the part of the defendant. Even if there was fraud, the fraud was discoverable and could have been exposed by the present plaintiffs in the previous proceedings;

(3) the plaintiffs are bound by their pleadings in the previous proceedings and are thereby estopped from raising the point in the present action;

(4) in the present case the plaintiffs' claim is devoid of merit and it could not possibly succeed.

Cases referred to:

(1) *Wright* v. *Prescot Urban District Council* (1916) 115 L.T. 772.
(2) *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah* [1967] 2 M.L.J. 89, 90.
(3) *Cooke* v. *Loxley* (1792) 5 Term. Rep. 4; 101 E.R. 2.
(4) *Cuthbertson* v. *Irving* (1859) 4 H & N 742 affirmed; (1860) 6 H & N 135; 158 E.R. 56.
(5) *Duke* v. *Ashby* (1862) 7 H & N 600; 158 E.R. 6, 10.
(6) *Weeks* v. *Birch* (1893) 69 L.T. 759.
(7) *Panton* v. *Jones* (1813) 3 Camp. 372 (per Baley J. @ 373); 170 E.R. 1415.
(8) *Cooper* v. *Blandy* (1834) 1 Bing. N.C. 45 (per Bosanquet, J. p.52); 131 E.R. 1034, 1037.
(9) *Seng Huat Hang Sdn. Bhd. & Ors.* v. *Chee Seng & Co. Sdn. Bhd.* [1986] 1 M.L.J. 348.
(10) *Lawrance* v. *Lord Norreys* [1890] A.C. 210, 219.
(11) *Willis* v. *Earl Beauchamp* (1886) 11 P.D. 59.
(12) *Duches of Kingston's Case* (1776) 2 Smith L.C. (13th ed.) 644, 651.
(13) *Jonesco* v. *Beard* [1930] A.C. 298 H.L. @ 301.
(14) *Price* v. *Stone* [1964] V.R. 106.